STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 19, 2005
v	No. 252306 Wayne Circuit Court
RON ISAAC, Defendant-Appellant.	LC No. 03-007754-01

Before: Saad, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of five counts of first-degree criminal sexual conduct involving his ten-year-old daughter, MCL 750.520b(1)(a), and was sentenced to a prison term of 240 to 480 months. Defendant appeals as of right. We affirm.

I. Evidentiary Issues

Defendant first argues that he was denied a fair trial because the opinion testimony of Dr. Earl R. Hartwigg, and the hearsay testimony of Annie Honeycutt, Lawanda Flak and Officer Brian Vieau, improperly bolstered the victim's credibility. Defendant failed to preserve this evidentiary issue by objecting at trial and specifying the same ground for objection that he asserts on appeal. MRE 103(a)(1); *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Our review is therefore for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

First, Dr. Hartwigg was qualified as an expert in the field of child sexual assault. Expert testimony is admissible under MRE 702 if (1) the witness is qualified, (2) the testimony is relevant in that it assists the trier of fact to understand the evidence or determine a fact in issue, and (3) the testimony is derived from recognized scientific, technical, or other specialized knowledge. *People v Beckley*, 434 Mich 691, 710-719; 456 NW2d 391 (1990).

Defendant specifically relies on *People v Smith*, 425 Mich 98; 387 NW2d 814 (1986), in support of his argument that Dr. Hartwigg's testimony was inadmissible because it was based simply on the history given by the victim rather than objective or physical findings. In *Smith*, *supra*, our Supreme Court reversed a criminal sexual conduct conviction where the prosecution's medical expert based his opinion that the victim had been sexually assaulted not on objective

medical findings within the realm of his expertise as a gynecologist, but rather on the victim's emotional state and information given him by the victim. *Id.* at 112-113.

Unlike the situation presented in *Smith, supra* at 112-113, Dr. Hartwigg did not offer a purely subjective opinion that the victim told the truth. *Id.* at 113. Dr. Hartwigg never opined specifically that defendant had assaulted the victim, or that an assault had taken place at a particular time or place. *Id.* at 110-111. Instead, based on his physical examination of the victim and his experience and his training, Dr. Hartwigg explained how the victim's history was consistent with his physical findings. He testified that the victim's physical examination was "normal," which means that there was no evidence of sexually transmitted diseases, gross redness or irritation, blood discharge, serious trauma or large tears at the hymen opening. Dr. Hartwigg explained that such "normal" findings in terms of the genital and anal examinations were consistent with the victim's statement that her last contact with defendant had occurred almost two weeks earlier. Dr. Hartwigg explained that the majority of children who are abused have a normal physical examination because the types of abuse in children rarely create injuries, and abrasions in the genital and anal area tend to heal exceedingly fast, sometimes within twenty-four hours. Regarding the absence of large tears at the victim's hymen, Dr. Hartwigg explained that there might be some partial penetration into the hymen opening without tearing the hymen itself because the hymen is an elastic structure. Dr. Hartwigg further testified that the victim's statement regarding the pain and burning urination is consistent with mucosal irritation, irritation of having some contact in the genitalia area. Dr. Hartwigg's expert opinion was based on the proper medical foundation and was admissible. *Id.* at 115.

Second, the victim's statements regarding the incident that were made to Annie, Lawanda, and Officer Vieau were not inadmissible hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801(c). An out-of-court statement introduced to show its effect on a listener, as opposed to proving the truth of the matter asserted in it, does not constitute hearsay under MRE 801(c). *People v Byrd*, 207 Mich App 599, 603; 525 NW2d 507 (1994). The victim's statement to Annie was not offered to prove the truth of the matter asserted; rather, the purpose of the statement was to explain Annie's subsequent action of calling the victim's mother and encouraging the victim's mother to speak with the victim about the incident. MRE 801(c). Consequently, the testimony was not hearsay and its admission was proper. *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997); MRE 803A. Similarly, the victim's statement to Lawanda was not offered to prove the truth regarding the sexual assault, but rather to explain why Lawanda subsequently took the victim to the Children's Hospital emergency room. *In re Weiss*, *supra* at 39. And Officer Vieau's testimony was not offered to prove the truth regarding the sexual assault, but rather to explain what report was made at the hospital. MRE 801(c); *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). Because the challenged statements did not constitute hearsay, there was no plain error in the admission of the evidence. *Carines*, *supra* at 763.

We also reject defendant's argument that Annie's "expert" opinion regarding the victim's behavior was beyond her expertise as a foster care provider. The record shows that Annie's testimony was not offered as expert witness testimony regarding the victim's post-incident behavior, but merely to explain what led Annie to question the victim about the sexual incidents

between the victim and defendant. MRE 801(c). As such, there was no plain error in admitting the challenged evidence.

II. Prosecutorial Misconduct

Defendant contends that the prosecutor committed misconduct by eliciting irrelevant and prejudicial other acts evidence. Defendant also argues that the prosecutor's remarks in closing argument regarding the credibility of her witnesses and defendant's guilt constituted misconduct. Defendant failed to preserve this prosecutorial misconduct issue for review by timely and specifically objecting to the prosecutor's challenged misconduct. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Review is therefore for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

First, the prosecutor did not commit plain error in introducing other acts evidence that defendant assaulted his girlfriend, who is Annie's daughter. To be admissible under MRE 404(b), other acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *Knox*, *supra* at 509; *Lewis v Legrow*, 258 Mich App 175, 208; 670 NW2d 675 (2003). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Crawford*, 458 Mich 376, 391; 582 NW2d 785 (1998).

Here, the evidence was not offered to establish defendant's character. Rather, the evidence was brought out on redirect examination to support Annie's credibility after defendant questioned Annie on cross-examination about her relationship with her daughter. During cross-examination, Annie testified that her accusations regarding defendant destroyed her relationship with her daughter, yet her daughter was living with her at the time of trial. Defendant attacked Annie's credibility by showing the inconsistency in her testimony. On redirect examination, the prosecutor introduced the evidence of defendant's assault on his girlfriend to explain why his girlfriend moved into Annie's house in spite of their deteriorated relationship. Questions that bear on a witness' credibility are always relevant. *People v Mills***,** 450 Mich 61, 72-74; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995).

Defendant fails to show that the probative value of the other acts evidence was substantially outweighed by the danger of unfair prejudice. Evidence is unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Here, it is unlikely that the jury gave the evidence of defendant hitting his girlfriend undue or preemptive weight because it was evidence of a different type of crime and because the evidence was not such that it would inflame a jury's passion or prejudice. *People v McGuffey*, 251 Mich App 155, 164; 649 NW2d 801 (2002). The prosecutor did not engage in misconduct by introducing the other acts evidence.

Defendant further claims the prosecutor committed misconduct by expressing a personal belief in the credibility of the victim and Annie, as well as in defendant's guilt. Allegations of prosecutorial misconduct must be examined and evaluated in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Furthermore, prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), overruled on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A prosecutor is afforded great latitude in closing argument. He is permitted to argue the evidence and make reasonable inferences to support his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Although a prosecutor may not vouch for the credibility of a witness by implying that he or she has some special knowledge that the witness is testifying truthfully, *Bahoda*, *supra* at 276, a prosecutor may argue on the basis of evidence presented that a witness is credible. *Schutte*, *supra* at 722. Viewing the challenged remarks in context, the prosecutor did not argue that she had some special knowledge that the victim's and Annie's testimony was truthful; rather, she argued that the evidence supported their testimony. In addition, defendant fails to identify any argument of the prosecutor where the prosecutor expressed a personal belief in defendant's guilt. Moreover, any prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). Under these circumstances, we conclude that no plain error occurred. *Rodriguez*, *supra* at 32.

III. Ineffective Assistance of Counsel

Defendant raises multiple allegations of ineffective assistance of counsel in his appellate and standard 11 briefs. Whether considered individually or cumulatively, the allegations do not support a finding that defendant was denied a fair trial as the result of ineffective assistance of counsel.

Because a *Ginther*[1] hearing was not held in the trial court, our review of defendant's ineffective assistance of counsel claims is limited to the mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). In reviewing a claim of ineffective assistance of counsel, a trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), and the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant assumes a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

First, defendant's claim of ineffective assistance of counsel based on his counsel's failure to object to alleged evidentiary errors is without merit in light of our conclusion that the challenged testimony of Dr. Hartwigg, Annie, Lawanda, and Officer Vieau was properly admitted. Counsel is not required to make a frivolous objection, or advocate a meritless position. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003). Further, the victim's statements to Annie, Lawanda, and Officer Vieau were cumulative to the victim's trial testimony. Accordingly, defendant failed to demonstrate that there is a reasonable probability that, but for counsel's alleged failure to object, the result of the proceeding would have been different. *Toma, supra* at 302.

Second, defendant's claim of ineffective assistance of counsel based on his counsel's failure to object to the prosecutorial misconduct is without merit in light of our conclusion that the other acts evidence was properly admitted. Defense counsel was not required to object to the bad acts evidence or to bring a fruitless motion for a mistrial. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Moreover, defense counsel's decision to ask defendant's girlfriend about the other acts evidence in his case-in-chief was trial strategy to show inconsistencies between her testimony and Annie's testimony regarding the fight between the girlfriend and defendant or to show Annie's animosity toward defendant. *People v Matuszak*, 263 Mich App 42, 58; 687 NW 2d 342 (2004).

Third, contrary to defendant's contention, a review of the record shows that defense counsel adequately advised defendant regarding his right to testify and defendant decided not to testify.

Fourth, defense counsel was not ineffective for failing to remove a victim of rape from the jury for cause or by peremptory challenge. Counsel's decisions relating to the selection of jurors is generally a matter of trial strategy. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Counsel's decision to keep Juror No. 4 in the jury was sound trial strategy because Juror No. 4 indicated that she could function as a fair and impartial juror and would not want defendant to be falsely accused. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Fifth, defendant's argument that his counsel should have called other witnesses, such as the nurse or other residents in the locations where the sexual assaults were reported to occur, is without merit. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy that this Court will not second-guess. *People v Dixon*, 263 Mich App 393, 398; 668 NW2d 308 (2004). Failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. *Id*. Also, the "defendant has the burden of establishing the factual predicate for his claim," and "to the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record" that supports the claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Here, it is impossible to determine whether defense counsel was ineffective in failing to call other witnesses because defendant never states what his other witnesses would have testified about or provides any documentary evidence to demonstrate how their testimony could have been favorable to defendant. The record suggests that critical witnesses were called. Defendant has failed to show that his counsel's failure to call other witnesses affected the outcome of the trial or deprived defendant of a substantial defense. *Dixon, supra* at 398.

Sixth, we reject defendant's argument that defense counsel failed to adequately investigate and prepare for trial. Defense counsel's decision not to acquire the victim's journal or confidential records regarding the victim's communications with her therapist, as well as her school records, is presumed to be a matter of trial strategy. *Dixon, supra* at 398. Defendant has failed to overcome that presumption. He fails to specify in his brief exactly what these "confidential records" provide or demonstrate by offer of proof how the outcome would have been different but for the alleged absence of such records. *Id.*

Seventh, in his standard 11 brief, defendant argues that his counsel was ineffective for conceding defendant's guilt during the jury selection process by stating to the prospective jurors, "This involves a man committing a sexual offense on a female to start with." We disagree. Only a complete concession of guilt constitutes ineffective assistance of counsel. *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). Counsel's challenged remark does not amount to a concession of guilt. Upon examination of counsel's remark in context, it is clear that defense counsel was merely questioning the prospective jurors regarding any potential bias against a man being accused of committing a sexual offense on a woman. The questioning of the jurors regarding potential bias was sound trial strategy to determine the challenges for cause. See *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999) (holding that this Court will not substitute judgment for counsel's regarding matters of trial strategy). Also, the challenged remark was brief, and defendant has failed to show that the outcome of the trial would have been different had such brief remark not been made. *People v Morales*, 240 Mich App 571, 586; 618 NW2d 10 (2000).

Defendant further alleges defense counsel conceded during his closing argument that no reasonable doubt exists regarding the only factual issue in dispute. But defendant fails to cite to the allegedly improper statement in the record and fails to articulate how defense counsel's allegedly improper statement would have affected the outcome of his trial. Defendant may not simply announce his position and leave it to this Court to search for the factual basis for his claim. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Because defendant failed to properly address the merits of the issue, we deem it abandoned and decline to address it. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Eighth, defendant raises multiple issues relating to his counsel's failure to impeach the prosecution witnesses with a great deal of impeachment evidence. We first reject defendant's contention that defense counsel failed to cross-examine and impeach the prosecutions' witnesses regarding the victim being in therapy. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy that this Court will not second-guess. *Dixon, supra*, p 398. As the trial court recognized, the evidence of the victim seeing a therapist was irrelevant to this instant case. There is also only a brief reference to the victim seeing a therapist throughout the trial. Also, the prosecutor and defense counsel did not raise any argument relating to this challenged evidence. Under these circumstances, we conclude that defendant failed to establish that the outcome of trial would have been different had trial counsel cross-examined or impeached the prosecution's witnesses with the evidence related to the victim's therapy. *Toma, supra* at 302.

We also reject defendant's contention that defense counsel failed to cross-examine the victim regarding Annie's animosity toward defendant. Decisions regarding the examination of witnesses are presumed to be matters of trial strategy that this Court will not second-guess.

Dixon, supra at 398. Defendant failed to overcome that presumption because the victim's testimony regarding what she heard would have constituted inadmissible hearsay and there is no reasonable probability that such evidence would have impacted the jury's verdict. *Toma, supra* at 302.

We further reject defendant's contention that his counsel was ineffective for failing to impeach Annie or the victim with their conflicting statements regarding whether the victim liked to interact with other kids. Annie's testimony regarding the victim's withdrawal symptoms was not offered as expert witness testimony regarding the victim's behavior, but merely to explain what led Annie to question the victim. As such, while the victim's and Annie's testimony reveals some inconsistency on this point, we hold that any additional impeachment by defense counsel on the point would not have changed the outcome of the trial. *Toma, supra* at 302.

Defendant further asserts that defense counsel should have impeached the victim with her inconsistent statement to "Dr. Singh" that she did not want to be at Annie's house. But defendant fails to cite to anything in the record or present Dr. Singh's report to support his claim. Also, defendant failed to articulate how impeaching the victim with her inconsistent statement to Dr. Singh would have affected the outcome of his trial. This Court is not required to make defendant's arguments for him and his claimed error is deemed abandoned. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). We reject defendant's claim that defense counsel's failure to comply with each of defendant's requests to take certain actions demonstrates ineffective assistance of counsel. "A difference of opinion between defendant and defense counsel on trial tactics does not mean that there was ineffective assistance of counsel." *People v Cicotte*, 133 Mich App 630, 637; 349 NW2d 167 (1984).

Defendant also argues that defense counsel was unprepared for trial. Other than a vague reference to counsel's failure to investigate into Dr. Singh's report to impeach Dr. Hartwigg's report, defendant does not indicate how his counsel was unprepared. Defendant may not simply announce his position and leave it to this Court to search for the factual basis for his claim. *Traylor, supra*, p 464.

Upon review of the record, we reject defendant's claim that his counsel was ineffective for failing to investigate into Dr. Singh's report. Defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Decisions regarding what evidence to present are matters of trial strategy, which will not be second-guessed. *Dixon, supra* at 398. In this instant case, Dr. Hartwigg testified at trial that the victim's physical examination was "normal." Dr. Hartwigg's testimony is not contrary to Dr. Singh's alleged finding of no recent or old injuries from the victim. Thus, it may have been trial strategy not to present Dr. Singh's report**,** which would be cumulative to Dr. Hartwigg's testimony and which may even highlight Dr. Hartwigg's testimony that the types of abuse the victim suffered rarely create injuries. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. See *Matuszak, supra* at 58. That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Defendant asserts that Dr. Singh's report contained certain statements of the victim that were omitted from Dr. Hartwigg's report and that Dr. Singh's report indicated that he found no injuries recent or old. However, defendant makes no citation in the record to support his claim. *Hoag, supra* at 6. Defendant failed to state what

statements were omitted from Dr. Singh's report or to demonstrate by offer of proof how Dr. Singh's report could have contradicted Dr. Hartwigg's report. Thus, defendant failed to overcome the presumption accorded trial counsel on matters of trial strategy. *Dixon, supra* at 398. Moreover, the evidence to convict defendant was overwhelming, as the victim clearly testified regarding her sexual activities with defendant.[2] Thus, we hold that some minor inconsistencies between two reports, even if existed, would not have contributed to a substantial, outcome-determinative defense, a prerequisite to appellate relief. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996).

Defendant next argues that defense counsel was ineffective for failing to have biased jurors removed during the jury selection process. Specifically, defendant asserts that defense counsel should have removed Juror No. 5 from the jury after she stated that her mother had been sexually assaulted on three separate occasions. Also, defendant asserts that defense counsel should have removed Juror No. 12 from the jury after she made a biased statement that she would have mixed feelings regarding defendant's guilt if defendant did not testify. We disagree. Counsel's decisions relating to the selection of jurors is generally a matter of trial strategy. *Johnson, supra* at 259. Juror No. 5 stated to the trial court that she believed she could be fair to both sides and the trial court accepted her assurance. Thus, the record reveals no obvious cause for Juror No. 5's removal. Also, the record reveals no obvious cause for Juror No. 12's removal because Juror No. 12 stated to the trial court that defendant has the right not to testify and did not indicate that he would hold mixed feelings against defendant. Defense counsel adequately received assurances from prospective jurors, including Juror No 12, that they have no potential bias regarding defendant's right not to testify. As such, defendant failed to show any prejudice or to overcome the presumption that defense counsel's method of jury selection was sound trial strategy. *Id.*

Finally, defendant alleges that his counsel was ineffective for failing to prepare for sentencing. Specifically, defendant argues that his counsel failed to present the mitigating testimony of his families, friends, fiancée, and pastor at sentencing. Whether to address the court at sentencing is a tactical decision to be made by defense counsel. *People v Hughes*, 165 Mich App 548, 550; 418 NW2d 913 (1987). At sentencing, defendant does not mention, nor does the record reveal, any mitigating factors of which the sentencing court was not previously aware. Accordingly, we hold that defendant failed to establish either that counsel's performance fell below an objective standard of reasonableness or that, but for counsel's error, the result of the proceedings would have been different. *Toma, supra* at 302.

Defendant next contends that his counsel was ineffective for failing to investigate defendant's background and to challenge information in the presentence information report hat defendant had been convicted of a domestic violence charge and abused his children. Defendant asserts that he was not convicted of the domestic violence charge and it was improper for the

[2] The testimony of a victim need not be corroborated in prosecutions for sexual assault. MCL 750.520h; MSA 28.788(8). See also *People v Smith*, 149 Mich App 189, 195; 385 NW2d 654 (1986).

judge to assume that he had abused his children.[3] Due process is satisfied if the sentence is based on accurate information and the defendant had a reasonable opportunity to challenge the information at sentencing. *People v Williams*, 215 Mich App 234, 236; 544 NW2d 480 (1996). At sentencing, defendant challenged his violation of probation listed in the presentence report, but he did not challenge the accuracy of his prior felony conviction. Also, nothing in the record shows that the trial judge relied on inaccurate information in the presentencing report. Moreover, contrary to defendant's argument, trial counsel clearly indicated that defendant was acquitted of criminal sexual conduct charge, and the trial judge did not consider that defendant was convicted of domestic violence charge or assume that defendant abused his children. Accordingly, there has been no violation of defendant's right to due process. *Id.* As such, the record does not support defendant's claim that counsel was ineffective for failing to challenge information.

IV. Appointment of New Counsel

Defendant argues that the trial court erred in failing to appoint new counsel because there was a breakdown in communication between defendant and his defense counsel. We review for an abuse of discretion a trial court's decision regarding substitution of counsel. *Traylor, supra* at 462.

An indigent defendant is not entitled to the counsel of his choice. Rather, he is entitled only to representation by counsel who performs at least as well as a lawyer with ordinary training and skill in the criminal law. *Traylor, supra* at 462. Appointment of substitute counsel is warranted only on good cause shown and where substitution of counsel will not unreasonably disrupt the judicial process. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Good cause exists where a legitimate difference of opinion develops between defendant and appointed counsel regarding a fundamental trial tactic. *People v Williams*, 386 Mich 565; 194 NW2d 337 (1972). A mere allegation that defendant has lost confidence in appointed counsel is not good cause to substitute counsel. *Traylor, supra* at 463. Defendant's allegation that defense counsel did not see things defendant's way is also not good cause. *People v Meyers (On Remand)*, 124 Mich App 148, 165-166; 335 NW2d 189 (1983).

Defendant complained at a final pretrial conference that he wanted a new attorney because he believed that defense counsel had agreed to a postponement of the trial date to accommodate the prosecutor. Defendant's argument in support of substitute counsel was found by the trial court to be inadequate. We find no error in that determination. The record shows that the trial court tried to accommodate defense counsel's request for an early date for the jury trial, and that the trial court, not defense counsel, set the trial date. Thus, defendant's concern regarding the trial date has no merit. Also, contrary to defendant's argument, there was no showing of breakdown of the attorney-client relationship. Defendant's mere allegation that he

[3] Notably, defendant failed to present this issue having failed to raise it before, during, or after sentencing. MCL 769.34(10). However, this Court has held that a defendant nonetheless secures appellate review of a sentencing issue when the issue is raised under the rubric of an ineffective assistance of counsel claim. *People v Kimble*, 252 Mich App 269, 279 n 7; 651 NW2d 798 (2002).

lost trust in his counsel's loyalty is not good cause to substitute counsel. See *Traylor*, *supra* at 463. Accordingly, the trial court did not abuse its discretion in refusing to order substitution of counsel.

V. Cumulative Errors

Defendant argues that cumulative effect of errors denied him a fair trial. The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). Only actual errors are aggregated to determine their cumulative effect. *Rice*, *supra* at 448. Having found no errors, we reject defendant's claim that the cumulative effect of multiple errors requires a new trial. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski